

# Analysis of H.R. 5781, California Emergency Drought Relief Act of 2014

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## Summary

California is experiencing serious water shortages due to widespread drought. Both of the state's large water infrastructure projects, the federal Central Valley Project (CVP) and the State Water Project (SWP), have had to reduce water deliveries in 2014 to the farmers and communities they serve. Dry hydrological conditions, in combination with regulatory restrictions on water being pumped from the Sacramento and San Joaquin Rivers Delta confluence with the San Francisco Bay (Bay-Delta) to protect water quality and fish and wildlife, have resulted in water supply cutbacks for CVP and SWP water users throughout their respective service areas and historic cutbacks to senior water rights in some areas. The effects are widespread and are being felt by many economic sectors, including agriculture, urban areas, and fish and wildlife resources.

Several bills have been introduced in the 113<sup>th</sup> Congress to address California water supply and drought in particular. The most recent of these was H.R. 5781, the California Emergency Drought Relief Act of 2014, introduced on December 2, 2014. It contains three titles that aim to increase water supplies for users through approving modifications in water conveyance operations and certain water projects. Under the bill, these actions are to be consistent with existing laws and regulations. It also would aim to protect water rights and existing water allocations for users under certain circumstances, and would aim to prohibit any "redirected adverse water supply or fiscal impacts." The proposed legislation would expire on either September 30, 2016, or on the date that the governor of California suspends the state of drought emergency declaration, whichever is later.

This report provides a description and analysis of H.R. 5781, the California Emergency Drought Relief Act of 2014, which passed the House December 9, 2014. It includes a summary of key provisions of the bill, and compares it with two other bills from the 113<sup>th</sup> Congress aiming to address different aspects of drought and water management in California: H.R. 3964, which passed the House on February 5, 2014; and S. 2198, which passed the Senate on May 22, 2014. Some of this analysis draws from a CRS report comparing the two earlier bills: CRS Report R43649, *Federal Response to Drought in California: An Analysis of S. 2198 and H.R. 3964*, by Pervaze A. Sheikh, Betsy A. Cody, and Charles V. Stern.

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## Introduction

California is experiencing serious water shortages due to widespread and exceptional drought. Even though much of the state is served by two large water infrastructure projects that store water for future use—the federal Central Valley Project (CVP) and the State Water Project (SWP)—both projects have had to reduce water deliveries to the farmers and communities they serve. Many water users have received no water from the CVP and SWP this year and are supplementing surface water supplies with groundwater. Some water basins are experiencing overdraft of local aquifers (i.e., extraction of more groundwater than is being replenished). The dry hydrological conditions, in combination with regulatory restrictions on water being pumped from the Sacramento and San Joaquin Rivers Delta confluence with the San Francisco Bay (Bay-Delta) to protect water quality and fish and wildlife, have resulted in water supply cutbacks for CVP and SWP water users throughout their respective service areas, and in historic cutbacks to senior water rights in some areas. The effects are widespread and are being felt by many economic sectors. The extent and severity of the drought is also taking its toll on fish and wildlife resources and has increased concern for wildfires. California's complex water supply systems also experienced severe water supply shortages during a recent three-year drought, which lasted from 2008 to 2010, during a six-year drought from 1987 to 1992, and during a two-year drought from 1976 to 1977.

CVP and SWP water operations and water supply reductions have been at the heart of legislation in the 113<sup>th</sup> Congress aimed at addressing management of the systems in response to the current drought in California. Faced with the prospect of another dry winter and water shortages in 2015, the short-term issue for Congress is how to respond to demands for increased water deliveries, while avoiding harm to the environment (including several fish species and water quality) and economies that depend directly on environmental resources (e.g., recreation, commercial and sport fishing). Other issues include how to address water supply in general and how to finance any improvement or increase in water supply storage given current fiscal constraints and earmark moratoria. A longer-term issue for Congress is how to improve federal water delivery reliability and stabilize the aquatic ecosystems upon which water and power users, and diverse economies, depend, while also maintaining federally listed species and water quality.

Several bills have been introduced in the 113<sup>th</sup> Congress to address California water supply and drought, and management of the CVP and SWP in particular. This report provides a description and analysis of H.R. 5781, the California Emergency Drought Relief Act of 2014, which was introduced on December 2, 2014, and includes brief comparisons with H.R. 3964, which passed the House on February 5, 2014, and S. 2198, which passed the Senate on May 22, 2014. Some of this analysis draws from a CRS report comparing the two earlier bills: CRS Report R43649, *Federal Response to Drought in California: An Analysis of S. 2198 and H.R. 3964*, by Pervaze A. Sheikh, Betsy A. Cody, and Charles V. Stern.

## Background

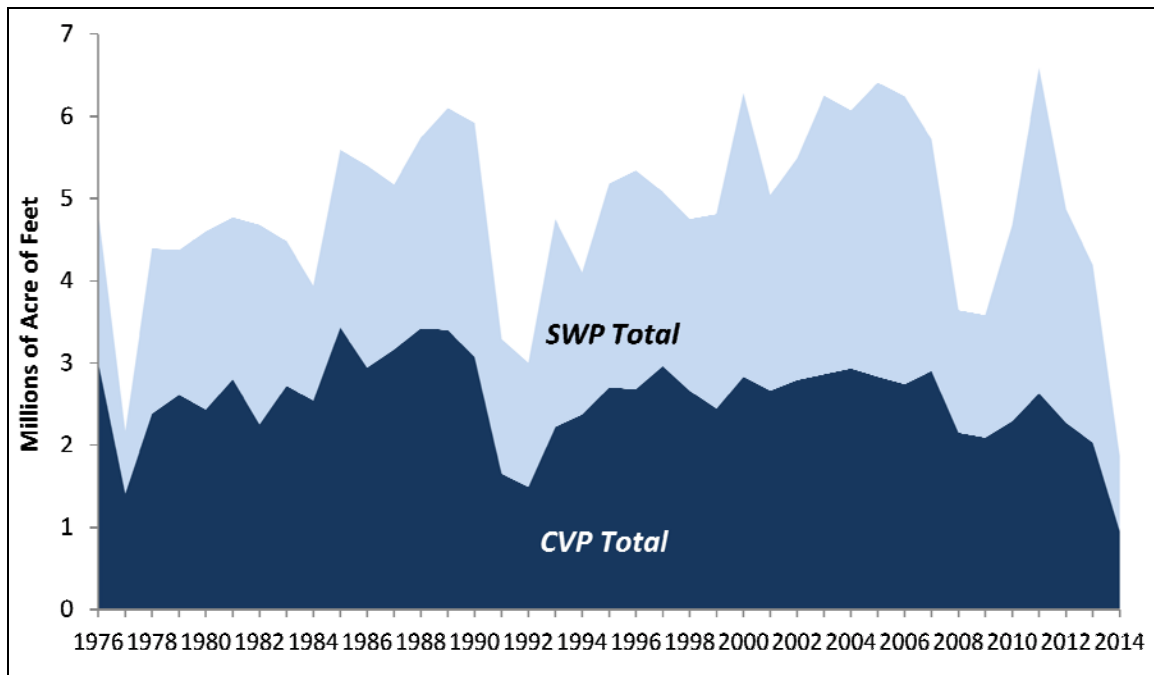
Although nearly 60% of California is experiencing exceptional drought—the most severe category classified by the U.S. Drought Monitor<sup>1</sup>—some water users also point to regulatory and

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<sup>1</sup> For a description of recent drought and hydrological conditions, see CRS Report IF10019, *H.R. 5781: Legislation to* (continued...)

court-imposed restrictions on water pumping to protect fish under the federal Endangered Species Act (ESA) as contributing to reduced CVP and SWP water deliveries. Thus, some refer to the drought as a “Congress-made” or “man-made drought.” Similar claims were made in 2009 after three years of drought conditions led to water supply shortages in California. Frustration for CVP and SWP water contractors also occurred when California experienced a very wet year in 2011, and water deliveries were still reduced. Conversely, fishermen and others questioned to what degree increased Delta pumping in 2004 contributed to fish declines. Although reservoirs were mostly near or above average entering the 2012 water year, low precipitation during the 2011/2012 winter and biological opinion requirements for managing Delta pumps resulted in reduced CVP water deliveries for 2012 and again in 2013, a below-normal water year.

**Figure I. CVP and SWP Combined Exports, 1976-2014**



**Source:** CRS, from data provided by the U.S. Department of the Interior, Bureau of Reclamation, e-mail communication, November 14, 2014, *Total Annual Pumping at Banks, Jones, and Contra Costa Pumping Plants 1976-2014 (MAF)*.

**Notes:** The spike in 2001 correlates with the filling of Diamond Valley reservoir and the ability of the SWP to export high excess winter flows, albeit in an overall dry year. The troughs in 1977, 1991-1992 (during the six-year drought of 1987-1992), and 2008-2009 reflect exports during previous California droughts.

A variety of factors affect CVP and SWP water deliveries. These include operational constraints pursuant to the federal ESA, as noted above, but also state water quality regulations and court orders implementing state and federal water quality and other laws, CVP allocations policies, and the state’s long established water rights system. These latter factors can exacerbate the impacts of drought on water deliveries to some contractors. For example, the system of state water rights has a profound effect on who gets how much water and when, particularly in times of drought or

(...continued)

*Maximize Water Supplies to Address Drought in California*, by Betsy A. Cody, Pervaze A. Sheikh, and Charles V. Stern; and CRS Report IF00008, *California Drought: Water Supply and Conveyance Issues*, by Betsy A. Cody.

other changes in the hydrologic cycle. Water shortages due to hydrologic variability and regulatory export restrictions have resulted in unequal impacts on CVP and SWP water contractors because of differences in priority of water rights underlying different water contracts and federal and state allocation policies. Although combined Delta exports have increased on average since the 1980s and early 1990s (see **Figure 1**, above), even with implementation of several regulatory restrictions, CVP water allocations for some contractors have been significantly reduced, even in non-drought years (see **Figure 2** for 2014 water-year allocations).

**Figure 2. Water Allocations for CVP Water Contractors in 2014**

<b>CVP Contractors</b>	<b>February</b>	<b>April</b>	<b>May</b>	
<b>Senior Water Rights</b>				
San Joaquin Exchange Contractors	40%	40%	65%	
Sacramento River Settlement Contractors	40%	75%	75%	
<b>Wildlife Refuges</b>				
NOD Refuges (Level 2)	40%	75%	75%	
SOD Refuges (Level 2)	40%	40%	65%	
<b>Friant Division</b>				
Class I Contractors	0%	0%	0%	
Class II Contractors	0%	0%	0%	
<b>Other CVP Water Service Contractors</b>				
NOD Ag. Service	0%	0%	0%	
NOD M&I	50%	50%	50%	
SOD Ag. Service	0%	0%	0%	
SOD M&I	50%	50%	50%	

**Source:** U.S. Department of the Interior, Bureau of Reclamation, *Summary of Water Supply Allocations*, p 4, [http://www.usbr.gov/mp/cvo/vungvari/water\\_allocations\\_historical.pdf](http://www.usbr.gov/mp/cvo/vungvari/water_allocations_historical.pdf).

**Notes:** “NOD” and “SOD” mean “North of Delta” and “South of Delta.”

## A “Wicked Problem”?

Legislation addressing the management of the CVP and SWP is particularly controversial because the coordinated operation and management of the CVP and SWP involves a complex web of federal and state law, including the state water rights priorities mentioned above; water delivery contracts; federal, state, and local agency policies; multi-agency agreements; and other factors. Achieving consensus on such legislation is often difficult because a change in any of these factors can affect other parties and interests, including potentially altering the timing or amount of water

<sup>2</sup> The term “wicked problem” is often used for social or cultural problems that are interconnected and social at their root. According to one source: “A wicked problem is a social or cultural problem that is difficult or impossible to solve for as many as four reasons: incomplete or contradictory knowledge, the number of people and opinions involved, the large economic burden, and the interconnected nature of these problems with *other* problems” (Jon Kolko, *Wicked Problems: Problems Worth Solving*, excerpted by the *Stanford Social Innovation Review*, at [http://www.ssireview.org/articles/entry/wicked\\_problems\\_problems\\_worth\\_solving](http://www.ssireview.org/articles/entry/wicked_problems_problems_worth_solving)).

made available to such parties or the underlying ecosystem. For example, if water pumped from the Delta is directed to be increased beyond the status quo, some question where that water will come from and what effect it might have on other water users or species, or in-Delta water quality. Similarly, by prohibiting involuntary reductions to those who receive water from the CVP and SWP, could that result in reduced water supplies or a change in the timing of water available to other water users not specified? How will such directions be squared with the declaration that the CVP must be operated in conformity with state water law and that there shall be “no redirected water supply or fiscal impacts”? For example, will it be possible to pump at the levels specified in the bill without having “redirected” impacts on other water users? How can such impacts be avoided, and if they cannot, who might bear responsibility or pay for unavoidable costs? These are some of the questions raised by H.R. 5781, as well as H.R. 3964 and S. 2198.

H.R. 5781 attempts to address these issues. Some proponents in favor of the bill state that it aims to provide additional water supplies for users without altering environmental laws and regulations, and while preserving water rights and priorities.<sup>3</sup> Further, they note that the bill would provide federal agencies with the flexibility to maximize water flows through the CVP and SWP in a short-term framework (i.e., the bill would expire in 2016 or when the California state drought emergency declaration is suspended).<sup>4</sup> Some opponents of the bill state that it would increase flows of water out of the Bay-Delta for municipal, agricultural, and industrial uses well as for species and habitat to the detriment of water quality in the Bay-Delta.<sup>5</sup> Further, they note that the bill would alter biological opinions (BiOps) for listed species under ESA by increasing pumping rates for water out of the Delta, ultimately reducing the protections for these species and their habitat.<sup>6</sup>

The Obama Administration on December 5, 2014, issued a Statement of Administration Policy opposing passage of H.R. 5781 on the grounds that it “fails to equitably address critical elements of California’s complex water challenges.”<sup>7</sup> The statement concludes with a notification of potential veto of H.R. 5781 after stating that “the bill appears to include a number of potentially conflicting mandates which can create confusion and undermine environmental laws, making it ripe for future litigation.” Governor Brown’s administration also stated that it opposed H.R. 5781 by implying that the bill would reignite water wars within the state of California.<sup>8</sup>

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<sup>3</sup> For example, see Rep. Tom McClintock, “California Emergency Drought Relief Act of 2014,” House Debate, *Congressional Record*, December 8, 2014, p. H8833.

<sup>4</sup> For example, see Fresno Bee Editorial Board, “Facts Support the Passage of Drought Relief Legislation,” *Fresno Bee*, December 6, 2014.

<sup>5</sup> For example, see Rep. Grace Napolitano, “California Emergency Drought Relief Act of 2014,” House Debate, *Congressional Record*, December 8, 2014, p. H8829.

<sup>6</sup> For example, see Letter from Audubon California, American Rivers, and Defenders of Wildlife, et. al. “Please Oppose H.R. 5781.” December 4, 2014.

<sup>7</sup> Executive Office of the President, *H.R. 5781—The California Emergency Drought Relief Act of 2014*, Office of Management and Budget, Statement of Administration Policy, Washington, DC, December 5, 2014, p. 1, <http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/113/saphr5781h-20141205.pdf>.

<sup>8</sup> Letter from John Laird, Secretary for California Natural Resources, to Members of the California Congressional Delegation, U.S. House of Representatives, December 9, 2014.



## Analysis of H.R. 5781

This analysis focuses on the most recently House-passed bill, H.R. 5781. It includes a brief summary of key provisions of H.R. 5781, and compares it to two other bills aiming to address different aspects of water supply and management in California: H.R. 3964 and S. 2198. Some of this analysis draws from a CRS report comparing the two earlier bills, CRS Report R43649, *Federal Response to Drought in California: An Analysis of S. 2198 and H.R. 3964*, by Pervaze A. Sheikh, Betsy A. Cody, and Charles V. Stern. A side-by-side comparison of comparable text in these bills is provided at the end of this report.

Portions of H.R. 5781 address policy questions stemming from limited CVP and SWP water supplies in a similar way to H.R. 3964 and S. 2198, with some exceptions. There are several slightly different and new provisions and subsections, including four new definitions in the bill. While Title I of H.R. 5781—in similar fashion to S. 2198—aims to maximize water supplies within existing law and regulations, Title II aims to protect third parties from “redirected” impacts and involuntary water supply reductions to the state and specified contractors (similar to language included in H.R. 3964 as passed by the House). There have been no hearings on the House- or Senate-passed bills, or on H.R. 5781, and only limited debate on the bills themselves. The issues the bills address, however, have been debated within Congress for several years, including during hearings on similar bills. Also, there are no estimates of how much more water might be gained if the bills were passed, nor is there information on how much might be made unavailable to varied interests compared with the status quo. Thus, CRS analysis of the potential impacts of the bill and its effects on interests is limited. Further, the full impact of the legislation will likely not be known until it is understood how the Administration would implement the bill, and how implementation might differ from current management practices.

## Summary of H.R. 5781

H.R. 5781 was introduced on December 2, 2014 and passed the House on December 9, 2014. It includes three titles, which are discussed below:

- **Title I. California Emergency Drought Relief.** This title proposes several temporary measures intended to address water supply constraints during the ongoing drought in California, including authorizing the Secretary of the Interior to “maximize” water deliveries from the CVP and SWP through various emergency projects. It would also allow for flows that would achieve a base level of pumping by the CVP and SWP during a “temporary period of operational flexibility” of 28 days each water year. These temporary levels may exceed those required under certain biological opinions prepared under the Endangered Species Act.
- **Title II. Protection of Third Party Water Rights.** Title II aims to protect California water rights priorities under state law by directing the Secretary of the Interior to “adhere to California’s water rights laws governing water rights priorities and to honor water rights senior to those held by the United States for operation of the Central Valley Project, regardless of the source of priority.” It goes on to list several specific California water code sections, including two that were not previously listed in H.R. 3964. It also addresses the rights related to specific diversions for senior water right holders in the Sacramento Valley and



sets out a new water allocation schedule for broadly defined Sacramento River watershed agricultural water service contractors.

- **Title III. Miscellaneous Provisions.** This title states that there shall be no effect on the Bureau of Reclamation's obligation to operate the CVP in conformance with state law and provides a sunset provision for the act (September 30, 2016, or the end of the California drought emergency declaration, whichever is later).

Each title of the bill is discussed in more detail below. Additionally, the table at the end of this document compares the text of H.R. 5781 to the relevant provisions of earlier drought bills in the 113<sup>th</sup> Congress.

## **Title I. California Emergency Drought Relief**

### **Section 101. Definitions**

Section 101 of H.R. 5781 contains definitions for the bill. Several terms are defined, including the Central Valley Project (CVP), Delta, State, and State Water Project (SWP). The "salmonid biological opinion" is defined as the opinion issued under the federal Endangered Species Act (ESA) by the National Marine Fisheries Service (NMFS) on June 4, 2009. The term "smelt biological opinion" is also defined as the biological opinion on the Long-Term Operational Criteria and Plan for coordination of the CVP and SWP issued by the Fish and Wildlife Service (FWS) on December 15, 2008. Both definitions for biological opinions (BiOps) appear to lock in the specified BiOp (based on its original date) for the bill. Since the bill could remain in effect for a period of time during which the BiOps could be amended or replaced, it raises the question of what would happen when an updated BiOp, perhaps based on new conditions or new information, conflicts with the earlier BiOps whose precedence appears to be mandated under the bill.<sup>9</sup> Further, it raises the question of how a new BiOp might be treated under the bill.

H.R. 5781 also contains a definition for the term "negative impact on the long-term survival":

The term 'negative impact on the long-term survival' means to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.

The term is used several times in subsections of Section 102(b) regarding how impacts on species are measured. Certain actions would be required unless they would reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species. For example, Section 102(b)(2)(B) states that OMR flows shall be managed at -5,000 "unless current scientific data indicate a less negative [OMR] flow is necessary to avoid a negative impact on the long-term survival of the listed species." The definition in Section 101(3) and its use in H.R. 5781 raise questions about how it might be implemented. For example, the definition does not refer to listed species' critical habitat, which is considered under the ESA as essential to the long-term health of the species. Some might question whether the term "distribution" as used in this definition would protect critical habitat or provide for recovery.<sup>10</sup> At least one group has asserted that the bill establishes a "new standard"

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<sup>9</sup> For example, see §4(c)(2)(B) and §(3)(B) of S. 2198.

<sup>10</sup> See Sections 102(b)(2)(A), (b)(2)(B), 103(c). Because the language is similar to somewhat controversial language in (continued...)

for implementation of the ESA, which could negatively affect healthy commercial and recreational fish stocks, as well as those listed as threatened or endangered under the federal ESA.<sup>11</sup> Others contend that the bill still requires compliance with the ESA. For example, proponents argue that under the bill (e.g., Section 102(a)), actions are to be consistent with existing laws and regulations, and therefore existing ESA provisions and regulations would remain in effect.<sup>12</sup>

## Section 102. Emergency Projects

### Section 102(a)

Section 102(a) of H.R. 5781 would direct the Secretary of Commerce and the Secretary of the Interior (together defined as “the Secretaries”) under §102(5) to direct the operations of the CVP and allow the SWP to provide the “maximum quantity of water supplies possible” to CVP agricultural, municipal and industrial (M&I), and refuge service and repayment contractors. The provision also allows SWP contractors, by approving, consistent with applicable laws and regulations, the following types of projects and operations:

- any project or operation to provide additional water supplies if there is any possible way to do so, unless the project or operations provide water supplies in a “highly inefficient” way, and
- any project or operation “as quickly as possible based on available information” to address emergency conditions.

H.R. 5781 conditions this directive by making it subject to the existing priority of individuals and entities for diversion of water over the rights of the United States for operation of the CVP and the state for the CVP. This appears to clarify that water supplies generated under the authority of this section are to adhere to existing water rights that are senior to those of the CVP and SWP.

H.R. 5781 reflects the approach of S. 2198 by directing the Secretaries to approve projects and operations to provide the maximum quantity of water supplies for users. Both bills would provide broad authority to the Secretaries to approve “any” project or operational change to address

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(...continued)

federal regulations—by using the phrase “survival *and* recovery” [italics added]—it is unclear whether it would conflict with the ESA by shifting the focus from recovery of the species to survival of the species. See CRS Report RL31654, *The Endangered Species Act: A Primer*, by M. Lynne Corn and Kristina Alexander. The report notes that under the ESA, federal agencies must consider whether their actions might destroy or adversely modify critical habitat. 16 U.S.C. § 1536(a)(2). The regulations define *destroy or adversely modify* as meaning “a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species.” 50 C.F.R. § 402.02. Courts have found that inclusion of the word “survival” is contrary to the ESA goal of recovering species and found the regulation invalid, but it has not been revised. See *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059 (9<sup>th</sup> Cir. 2004) (holding that the regulation was invalid); *Sierra Club v. U.S. Fish and Wildlife Service*, 245 F.3d 434 (5<sup>th</sup> Cir. 2001) (holding that the regulation was invalid).

<sup>11</sup> D.O. McIsaac, Executive Director, Pacific Fishery Management Council, Letter to Members of Congress providing comments in opposition to H.R. 5781 as introduced. Portland, OR, December 6, 2014.

<sup>12</sup> Congressional Record, 113<sup>th</sup> Congress, 2<sup>nd</sup> Session Issue: Vol. 160, No. 148. December 8, 2014, p. H883, Representative Valadao, “The bill is simple, and it is very specific that it does keep in place all protections of the Endangered Species Act, the biological opinions and others that have been put in place to protect the environment, but this does give a little more flexibility to those agencies to allow some pumping to help these poor communities.”

emergency provisions; however, limitations on this authority are contained in each bill. Further, this provision might be interpreted to convey less discretion to agencies when operating the CVP and provide them with specific authority to maximize water supplies. Agency actions would be pushed to maximize water supplies under this bill. To meet this directive, H.R. 5781 and S. 2198 state that projects and operations must be consistent with applicable laws and regulations. Both H.R. 5781 and S. 2198 would authorize the implementation of projects and operations as quickly as possible, which appears to reflect the urgency of addressing CVP and SWP water supply management during drought conditions. There are some key differences between the bills, however, that are summarized below:

- H.R. 5781 implies that the additional water supplies generated by projects and operations would be realized by maximizing the operations of the CVP and SWP. This could limit the range of projects and operations that could be considered to those that would result in increased water supplies for the CVP and SWP (e.g., through increased conservation measures, water transfers or banking, or use of innovative technologies for improved water management, such as desalination or water reuse). S. 2198 did not specify that additional water supplies would be generated solely through CVP and SWP.
- H.R. 5781 further directs the Secretaries to “allow” the SWP to maximize its water supplies. Some might question how the word *allow* would be interpreted in implementing this section.
- H.R. 5781 would not allow for “highly inefficient” projects or operations. S. 2198 as passed the Senate does not contain this provision.
- S. 2198 would provide the Secretary new authority to approve projects that would otherwise require congressional authorization. This provision appears to address or reduce the possibility of authorizing large water infrastructure projects such as the Bay Delta Conservation Plan (BDCP), which might normally require congressional authorization for implementation. H.R. 5781 does not contain this provision and instead directs the Secretaries to approve “any” project unless “highly inefficient.”

There are several questions and issues that might arise from this section in H.R. 5781 and that also apply to S. 2198. A brief summary of some of these points is listed below.

- Section 102(a) of H.R. 5781 raises the question of how agencies would provide the “maximum quantity of water supplies possible” to CVP and other contractors and, relatedly, how they would make such a determination consistent with laws and regulations. Implementation of the provision could be difficult and possibly contentious. For example, it might be difficult to measure the effects of providing maximum water supplies on species survival and viability and water quality until several years into the future. Conversely, agencies and water users may not agree that particular actions are providing maximum water quantities. Notably, under the status quo, some observers already believe the agencies are maximizing water supplies to the detriment of species, while others believe the agencies are not doing enough to maximize water supplies within the parameters of existing laws and regulations. Further, some advocates fear that the maximization language may result in reduced reservoir levels, thereby creating larger water supply

shortages in future years and jeopardizing urban water supplies.<sup>13</sup> On the other hand, if the legislation resulted in the SWP's ability to pump and store more water South-of-the-Delta or otherwise benefit from the legislation, its M&I contractors would also benefit – to the extent that such increases did not result in less water available in storage in future years. Some may respond that if the bill is enacted, agency actions specified under this section would be directed to maximize water supplies for contractors as a priority over other considerations (e.g., water quality or habitat conservation). In response to this concern, others might contend that other factors such as water quality and species needs are addressed in laws and regulations that would prevent harm.<sup>14</sup>

- H.R. 5781 uses the phrase “consistent with applicable laws” to condition the extent of projects and operations that can be used to maximize water supplies. This raises the question of how “consistent with the law” might be interpreted as opposed to “pursuant to” or “in compliance with” applicable laws. Some might question if the phrase “consistent with law” would allow for more agency discretion or flexibility than other phrases. Similar language was included in S. 2198.

### ***Section 102(b) Mandate***

Section 102(b) contains 8 subsections that would direct the Secretaries to implement several specific project-related and operational actions largely in California for carrying out §102(a). As with §102(a), the actions in this section would be accomplished consistent with applicable laws and regulations. A summary of the subsections is below:<sup>15</sup>

- Section 102(b)(1) would direct the applicable Secretary to ensure that the Delta Cross Channel Gates (Delta Gates) will remain open to the maximum extent practicable timed to maximize peak tide flood periods and to provide water supply and water quality benefits. According to the section, this operation is to be consistent with the State Water Resources Control Board (SWRCB) order for a Temporary Urgency Change (TUC) in terms, in response to drought, effective January 31, 2014, or a successor order. Further, findings on the diurnal behavior of juvenile salmonids would be used to manage the Delta Gates.<sup>16</sup> This subsection is similar in intent to section 4(C)(1) in S. 2198 with the exception of using the findings of diurnal behavior. S. 2198 would also direct the Secretaries to collect data on how the operations of the Delta Gates affect listed species under ESA, and effects on water quality, and water supply.<sup>17</sup> Further, S. 2198

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<sup>13</sup> Restore the Delta, *Call for Senator Dianne Feinstein to Keep Her Word on Drought Legislation*, Press Release, December 5, 2014.

<sup>14</sup> See general pro and con letters assembled at <http://mavensnotebook.com/2014/12/06/saturday-special-federal-drought-legislation-update-environmental-water-caucus-latino-water-coalition-write-letters-obama-threatens-veto/>.

<sup>15</sup> Several of these specified actions are focused on increasing water supplies (or minimizing reductions to water supplies); however, their effectiveness in achieving their objectives could be tempered by the condition that they are to be implemented consistent with applicable laws and regulations. Further, the actions specified in this section are only in effect until the governor of the state suspends the state of drought emergency declaration or September 30, 2016, whichever is later.

<sup>16</sup> Salmonid migration pathways are generally better accessed by salmonids when the Delta Gates are closed.

<sup>17</sup> Section 4(c)(2)(A).

would direct an assessment of the data collected, and require the Director of the National Marine Fisheries Service (NMFS) to make recommendations for changing the operations of the CVP and SWP.

- Section 102(b)(2)(A) would direct the Secretaries to implement turbidity control strategies that would allow for increased water deliveries while avoiding a negative impact on the long term survival of delta smelt at the SWP and CVP pumps.<sup>18</sup> Section 102 (b)(2)(B) would require the Secretary to operate pumps within the ranges provided for in the salmonid and smelt BiOps as defined in the act and manage the reverse flow of the Old and Middle River at negative 5,000 cubic feet/second (cfs), unless data indicates a lower negative flow is needed to avoid a negative impact on the long-term survival of the listed species.<sup>19</sup> If a lower negative flow is determined to be necessary, the finding must be in writing with an explanation of the data examined and how the data is connected to the choice to reduce the flows.<sup>20</sup> It is unclear how data can be collected and examined to justify a decision on turbidity control within the timeframe to make changes to water flows. This provision would also lower the discretionary ability of managers to change flows since they would have to collect data and justify their intent in writing before taking action.
- Section 102(b)(3) would direct the Secretaries to adopt a 1:1 inflow to export ratio (I:E ratio) for increased San Joaquin River flows resulting from “the voluntary sale, transfers, or exchanges of water from agencies with rights to divert water from the San Joaquin River or its tributaries.” The flow would be measured at Vernalis on a 3-day rolling average from April 1 through May 31 each year. The transactions described above could only proceed if the Secretary determines that the environmental effects of the transactions are consistent with applicable law and that conditions in the Delta are suitable for transferring water through the Delta according to permitted water rights. Some are concerned that adopting a 1:1 ratio could have an environmental effect on fish and habitat in the Delta if insufficient water supplies remain in the Delta. H.R. 5781 aims to address this issue by requiring a Secretarial determination that the transfers would be permissible under applicable law, including the ESA. Although language directing the Secretaries to adopt a 1:1 inflow to export ration is similar to that in S. 2198, there is no provision similar to Section 102(b)(3) in S. 2198.
- Section 102(b)(4) would direct the Secretaries to issue “all necessary permit decisions” under their authority for temporary barriers or operable gates in Delta channels to improve water quantity and quality for SWP and CVP water contractors and other water users within 30 days of receiving a permit application from the state. According to this section, barriers or gates “should” provide species benefits and protection of in-Delta water quality, and “shall” be designed so that formal Section 7 consultation under ESA would not be necessary. This

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<sup>18</sup> Delta smelt use turbid waters to consume nutrients and provide cover to hide from predators. Pumps create turbid waters because of the large amount of water, nutrients, and matter being drawn to them from the force of the pumping. Minimizing turbidity at the pumps is a conservation strategy for smelt because with less turbidity, fewer smelt would arguably be attracted to the pumps and get entrained.

<sup>19</sup> For more on these flows, see discussion below in “Section 103”

<sup>20</sup> Section 102(b)(2)(B).

- provision is similar to Section 4(c)(5) in S. 2198, except that S. 2198 only includes South-of-Delta water contractors for this action.<sup>21</sup>
- Section 102(b)(5)(A) would direct the Secretaries to complete all necessary National Environmental Policy Act (NEPA) and ESA requirements, within 30 days of receiving a request for a permit, for final permit decisions on water transfers associated with voluntary fallowing of nonpermanent crops in the state of California. Section 102(b)(5)(B) would allow for “any water transfer request associated with fallowing” to maximize water supplies for non-habitat uses, as long as the action would comply with federal law and regulations. This section is similar to Section 4(c)(6) of S. 2198. H.R. 3964 also contains language that would facilitate water transfers and associated permit decisions in accordance with ESA and NEPA. It appears that the proposed legislation would shorten the current time period for completing NEPA and ESA requirements, which would allow for expedited water transfers, especially when a listed species is involved. It is not clear how much water ultimately might be made available for export from the Delta under the expedited review process.
  - Section 102(b)(6) would allow any North of Delta agricultural water service contractor with unused CVP water to receive this unused water through April 15 of the following year if certain conditions are met, including (1) a request for an extension is submitted; and (2) the requesting contractor certifies that if the water is not received, they will have insufficient water supplies to meet contract obligations. S. 2198 and H.R. 3964 would direct rescheduled water supplies in the San Luis Reservoir to be held for use in the following year by water users.<sup>22</sup>
  - Section 102(b)(7)(A) would direct the Secretaries to “the maximum extent possible ... based on the availability and quality of groundwater and without causing land subsidence”<sup>23</sup> to meet Level 2 and Level 4 water supply needs of certain refuges through the improvement and installation of wells for groundwater resources and the purchase of water from willing sellers. Currently, multiple state and federally owned wildlife refuges in the Central Valley are served by surface water contract deliveries and other means (including wells and water purchases) required under the Central Valley Project Improvement Act (CVPIA).<sup>24</sup> H.R. 5781 would also redirect to CVP contractors a quantity of water equal to that obtained for refuges or “managed wetlands” from measures in subparagraph (A). This provision is similar in intent to §4(c)(9) of S. 2198, however, the water supplies for refuges would appear to be maximized from groundwater sources under H.R. 5781. It is uncertain how much of the refuge water supply needs could come from groundwater and whether it might cause a reduction in water supplies for other users, or if groundwater water quality would be suitable for refuge management.

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<sup>21</sup> See CRS Report R43594, *Analysis of Senate-Passed S. 2198: Emergency Drought Relief Act of 2014*, by Betsy A. Cody and Pervaze A. Sheikh.

<sup>22</sup> S. 2198 would also allow for rescheduled water supplies in the Millerton Reservoir.

<sup>23</sup> “Subsidence” refers to the gradual settling or sinking of the land surface due to subsurface movement of materials, such as removed water from aquifers as a result of groundwater pumping.

<sup>24</sup> P.L. 102-575, Title 34.



- Section 102(b)(8) would direct the Secretaries to implement “offsite upstream projects” in the Delta and upstream Sacramento River and San Joaquin River basins in coordination with California Department of Water Resources and Department of Fish and Wildlife. Projects are to offset the effects of actions taken under this act on ESA listed species. This is the same provision as Section 4(c)(12) in S. 2198. It appears that this language could apply to a broad range of projects, including habitat restoration projects. Projects might include habitat restoration, water quality improvements, storage, or potentially flow adjustments as long as they offset the effects of other projects that might be implemented under this bill. It is unclear, however, where the funding would come from for implementing these projects.

### **Section 102(c)-102(d)**

Section 102(c) states that the provisions of §102 shall apply to all federal agencies that have a role in approving projects in Sections 102(a) and (c) of this bill.

Section 102(d) would direct federal agencies, upon request of the state of California, to use “expedited procedures under this subsection” to make final decisions related to federal projects or operations that would provide additional water or address emergency drought conditions under §102(a) and (c). After receiving a request from the state, the head of an agency referred to in §102(a), or the head of another federal agency responsible for reviewing a project, the Secretary of the Interior would be required to convene a “final project decision meeting” with the heads of all relevant federal agencies “to decide whether to approve a project to provide emergency water supplies.” After receiving a request for resolution, the Secretary of the Interior would be required to notify the heads of all relevant agencies of the request for resolution, the project to be reviewed, and the date of the meeting. The meeting would need to be convened within seven days of the request for resolution. Not later than 10 days after that meeting is requested, the head of the relevant federal agency is to issue a final decision in writing on the project. Under Section 102(d)(5), the Secretary of the Interior would be authorized to convene a final project decision meeting at any time, regardless of whether a request for resolution is requested. This is the same language as S. 2198.<sup>25</sup>

### **Section 103**

Section 103 would authorize a new “temporary operational flexibility” that was not provided for in H.R. 3964 or S. 2198. The temporary period would be authorized for a “cumulative” period of 28 days after October 1 of each water year.<sup>26</sup> These operations are to be triggered during certain high flow conditions on the Sacramento River.<sup>27</sup> During these conditions, additional “negative flows” on the Old and Middle Rivers (also known as “OMR flows” which typically result from increased pumping by the CVP and SWP) than would otherwise be allowed under certain

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<sup>25</sup> An analysis of this issue can be found in CRS Report R43594, *Analysis of Senate-Passed S. 2198: Emergency Drought Relief Act of 2014*, by Betsy A. Cody and Pervaze A. Sheikh.

<sup>26</sup> For operations of the CVP and SWP, the water year runs from October 1<sup>st</sup> to September 30<sup>th</sup> of each year.

<sup>27</sup> The legislation specifies that daily average flows at or above 17,000 acre-feet per second at the Freeport gauge on the Sacramento River would trigger the temporary operational period. It does not specify how “lag” time in between gauge readings and pumping are to be handled.



biological opinions could occur.<sup>28</sup> Currently, ESA biological opinions for salmon and Delta smelt prohibit OMR flows more negative than -5,000 cubic-feet per second (cfs), which are considered unsafe for imperiled fish species. The legislation appears to direct flows that lead to a *daily* average of -7,500 cfs over a 28 day period. This would likely result in temporarily increased pumping and additional water supplies for some CVP and SWP contractors compared to what would otherwise be available. This section of the legislation also includes certain provisions to study and mitigate potential impacts associated with this new authority, including a period of “minimum duration” at the beginning of each water year during which the magnitude of negative OMR flow could be lessened (i.e., pumping decreased) to prevent smelt entrainment. It includes other assurances, such as providing that the section “shall not affect” the aforementioned salmon BiOp from April 1 to May 31, unless the Secretary of Commerce finds that some or all of the BiOp requirements may be adjusted without additional adverse effects beyond those allowed under the projects’ species take permits and other allowances pursuant to the federal ESA. Finally, Section 103 also provides that in implementing the temporary operational period, the Secretaries are required to meet the requirements laid out in the section, but shall not have to make additional efforts to justify their exercise of these authorities. Some of the most prominent provisions of Section 103 are summarized below:

- Section 103(a) would authorize CVP and SWP operations at levels that result in a daily average of Old and Middle River (OMR) flows of -7,500 cfs during “28 cumulative days after October 1” of each water year. These operations are authorized “consistent with avoiding a negative impact on the long-term survival in the short-term upon listed fish species under ESA.”<sup>29</sup> Section 103(b) states that these temporary operations are authorized only when specific daily average flow conditions (17,000 cfs) are met or exceeded at a specific point on the Sacramento River.
- Section 103(c) states that the Secretaries of the Interior and Commerce “may” continue imposing requirements under the smelt and salmon biological opinions “as they determine are reasonably necessary,” during the temporary period. However, it does not mandate that these provisions be imposed.
- Section 103(d)(1) would require that the bill be consistent with requirements under state law, such as the California State Water Resource Control Boards Decisions 1641 (also known as “D-1641”). It is not clear how these requirements might affect the proposed flexibility.
- Section 103(d)(2) would allow for “less negative” OMR flows (i.e., less pumping and more flows to benefit species) during the initial sediment flush each water year “for a minimum duration.”<sup>30</sup> This would be undertaken to avoid movement of smelt that would potentially increase entrainment at CVP and SWP pumps during this time.
- Section 103(d)(3) would require that the legislation not affect implementation of the salmon biological opinion from April 1 to May 31, except under certain

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<sup>28</sup> The risk of entrainment of listed species in Delta CVP and SWP pumps increases with increased reverse flows on the Old and Middle rivers, which occur as a result of Project export pumping. Such reverse flows can also alter turbidity and other habitat features for Delta smelt, which are listed as a threatened species under the federal ESA.

<sup>29</sup> It is not clear how such consistency would be determined.

<sup>30</sup> The exact length of time is unspecified in legislation.

emergency circumstances. Thus, that biological opinion would be effective during a two month period, unless the Secretary of Commerce determined that such actions would not be in violation of the federal ESA.

- Section 103(d)(4) would authorize a monitoring program that generally attempts to identify any negative impacts associated with the temporary flexibility being authorized under the section, including exceedance of incidental take levels under the ESA. It also would authorize actions to mitigate any negative impacts of other parts of this section.
- Section 103(e) would provide that CVP and SWP operations resulting in flows “less negative” than -7,500 cfs (i.e., less pumping)<sup>31</sup> before the 28 cumulative days of operational flexibility authorized shall not be counted toward the 28 cumulative day period in the legislation. Therefore, only days with a daily average flow of -7,500 cfs would be counted for the 28-day cumulative total.
- Section 103(f) would direct the commissioner to use emergency ESA consultation procedures if necessary to adjust BiOp criteria for the temporary period of operational flexibility.
- Section 103(g) would stipulate that in making determinations under this section, the Secretaries of the Interior and Commerce would not be required to provide supporting detail at a greater level than would be provided under this section.

Since comparable text to these provisions was not included in H.R. 3964 or S. 2198, there has been limited debate and analysis of the proposed temporary operational flexibility under Section 103. However, this section raises multiple questions, including: How much additional water would be made available to CVP and SWP water contractors with the flexibility proposed under this section? How would the proposed operational flexibility be balanced with requirements under the Endangered Species Act? What would be the effect of the new pumping levels on species? How would the requirement for adherence to California state laws affect implementation of this section?

## **Section 104**

Section 104 would require that the Secretary of the Interior provide a progress report on the implementation of Sections 101, 102, and 103 of the legislation 90 days after enactment, and every 90 days thereafter. No additional detail on the contents of this reporting is provided under the legislation.

## **Section 105**

Section 105 would require that one year after enactment, the Secretary of the Interior shall provide an update on the status of feasibility studies undertaken pursuant to Section 103(d)(1),<sup>32</sup> including timelines for completion and environmental documents. The reference to Section 103(d)(1) refers to feasibility studies for four water storage projects authorized under P.L. 102-

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<sup>31</sup> “Less negative” flows result in OMR flows shifting toward 0 cfs, and thus correlates to reduced pumping.

<sup>32</sup> sic, CRS has confirmed with House committee staff that this provision actually refers to this section of P.L. 102-575.

575, CALFED legislation: Shasta dam raise, Sites Reservoir, Los Vaqueros dam raise, and Upper San Joaquin River storage (often referred to as Temperance Flats).<sup>33</sup>

## **Title II. Protection of Third-Party Water Rights**

Title II includes provisions that aim to protect California water rights priorities under state law. It would do so by directing the Secretary of the Interior to “adhere to California’s water rights laws governing water rights priorities and to honor water rights senior to those held by the United States for operation of the Central Valley Project, regardless of the source of priority.”<sup>34</sup> The Title goes on to list several specific California water code sections, including two that were not previously listed in H.R. 3964. It also addresses water rights related to specific diversions for senior water right holders in the Sacramento Valley. Some of this language is more detailed than similar provisions in H.R. 3964. In contrast, S. 2198 simply states that “Nothing in this Act preempts any State law in effect on the date of enactment of this Act, including area of origin and other water rights protections” (Section 7 of S. 2198). The specificity in H.R. 5781 may raise questions as to what is not included in the water rights protection language. For example, H.R. 5781 includes language specifically protecting Friant water users from unintended impacts from Section 204, and the American River Division from Section 204(a) – two provisions not previously included in H.R. 3964.

Following is a discussion of key Title II sections and subsections:

### **Section 201. Offset for State Water Project**

Section 201 addresses “consistency determinations” for the SWP made or to be made by the California Department of Fish and Wildlife (DF&W) and provides that if more water is made available to the CVP than the SWP due to such determinations that the CVP shall offset such reductions. These determinations are to be made to comply with the California Endangered Species Act (CESA). In recent years the state has generally relied on federal NMFS and FWS BiOps for the coordinated operations of the SWP and the CVP, pursuant to the federal ESA, to suffice for compliance with CESA. The provision is discussed in more detail below:

- Section 201(a) directs the Secretary of the Interior to confer with DF&W on potential impacts to any ESA/CESA consistency determination for SWP operation “in connection with” implementation of this act.
- Section 201(b) states that if DF&W revokes consistency determinations for the SWP; amends or issues new consistency determinations resulting in reduced water supply to the

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<sup>33</sup> As noted above, Section 103(d)(1) pertains to remaining consistent with California state requirements, including those under Decision 1641.

<sup>34</sup> The U.S. Supreme Court has held that Section 8 of the Reclamation Act of 1902 (43 U.S.C. 383) requires Reclamation to comply with state law in the “control, appropriation, use or distribution of water” by a federal project. See *California v. United States*, 438 U.S. 645, 674-75 (1978). This requirement to comply with state law applied so long as the conditions imposed by state law were “not inconsistent with clear congressional directives respecting the project.” See *id.* at 670-73. Under Section 8 the agency is also required to acquire water rights for its projects, such as for the CVP. For the CVP, Reclamation found it necessary to enter into “settlement” or “exchange” contracts with senior water users who had rights pre-dating the project, and were thus senior water rights holders. “Sacramento River Settlement Contractors” are one such class; the “San Joaquin Exchange Contractors” are another.

SWP compared with water available under the 2008 Delta smelt BiOp and the 2009 salmonid BiOp; or, requires take limits under CESA for the SWP that directly or indirectly results in reduced water supply to the SWP as compared with the BiOps as defined in the act, and results in less water for the SWP than the CVP, then additional “yield” must be made available to the SWP to offset losses resulting from the “Department’s” action. Thus, it appears that if the state imposes stricter requirements on the operation of the projects under CESA, resulting in the CVP exporting more water than the SWP, then the SWP losses would need to be offset. It is not clear how this language relates to or might conflict with the Coordinated Operations Act (COA, P.L. 99-546), which in general directs the Secretary of the Interior to operate the CVP in conformity with state water quality standards for the Bay-Delta and in conjunction with the SWP, pursuant to a Coordinated Operations Agreement.

- Section 201(c) directs the Secretary of the Interior to immediately notify DF&W in writing if the Secretary determines that implementation of the BiOps “consistent with this Act” reduces environmental protections for any species covered by the opinions; however it does not prescribe any action.
- In sum, the section allows the state to revoke consistency, but if such action reduces water available to the SWP compared to the CVP, then the difference must be offset, presumably by the CVP or other federal means.

## **Section 202. Area of Origin Protections**

Section 202 addresses state water rights, generally directing the Secretary of the Interior in operation of the CVP to adhere to California water rights laws. It lists specific sections of the water code, many of which were also listed in H.R. 3964; however, two additional sections of the California Water Code Part 2 of division 2, Article 1.7 (sections 11461 and 11462) are listed. Section 202 also has more detail than S. 2198 regarding specific diversions protected with respect to implementation of the act and section 7 of the federal ESA (although, in parenthesis the entire ESA is referenced).<sup>35</sup> The specific references are provided below:

- Section 202(a) would direct the Secretary of the Interior in operation of the CVP to adhere to California water rights laws governing water rights priorities and to honor senior rights held by the U.S. for operation of the CVP, regardless of the source of priority, including pre-1914 appropriative rights and other specific rights “perfected or to be perfected pursuant to California water code Part 2 of Div. 2. Article 1.7 (commencing with section 1215 of chapter 1 of part 2 of division 2, sections 10505, 10505.5, 11128, 11460, 11461, 11462, and 11463, and sections 12200 to 12220).”
- Section 202(b) would direct that any action taken by the Secretaries pursuant “to both this Act and section 7 of the Endangered Species Act of 1973 (16 U.S.C. 1531, et seq.) requiring diversions from the Sacramento River or the San Joaquin River watersheds upstream of the Delta be bypassed[,] shall not be undertaken in a manner that alters the water rights priorities established by California law.” This diversion language is slightly different than that found in Section 401 of H.R. 3964; however, the difference may have

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<sup>35</sup> CRS has not analyzed the California Water Code. It is not clear without reviewing the specific sections referenced if they are inclusive of all appropriative and riparian water rights, watersheds or water basins.

significant meaning. First, H.R. 5781 refers to any action in both this act and Sec. 7 of ESA (federal agency responsibilities under ESA, including, among other things, consultation); whereas, H.R. 3964 refers to all actions under ESA (listing, conservation, enhancement, recovery or other protection of any listed species). Both versions appear to address protection of senior water rights holders and to require supercedance of state water rights priorities over impacts from implementation of ESA (Section 7 only, for H.R. 5781; although the reference in parenthesis includes the full ESA citation).

- Section 202(c) would direct that the title shall not alter existing authorities “provided to and obligations placed upon” the federal government under the ESA.
- Section 202(d) notes that with respect to individuals and entities with water rights on the Sacramento River, the mandates of this section may be met, in whole or in part, through a contract with the Secretary (presumably the Secretary of the Interior) executed pursuant to section 14 of P.L. 76-260 (43 U.S.C. 389; the Reclamation Project Act of 1939), which authorizes the Secretary of the Interior to enter into contracts for exchange or replacement of water, water rights, or adjustment of water rights, among other authorities (e.g., purchasing or condemning lands and interests in connection with construction or operation of a project), provided that such is in conformance with recently renewed Sacramento River Settlement Contracts. The status of these contracts is currently being litigated.<sup>36</sup>

### **Section 203. No Redirected Adverse Impacts**

Section 203(a) would direct the Secretary of the Interior to ensure that except as provided in water service or repayment contracts,<sup>37</sup> actions taken to comply with obligations imposed pursuant to or as a result of this act, including consultation under Section 7 of the ESA and other state and federal laws shall not directly or indirectly result in involuntary water supply reductions or fiscal impacts to those who receive water from the SWP or CVP due to the act. Nor shall they “cause redirected adverse water supply or fiscal impacts to those within the Sacramento River watershed, the San Joaquin River watershed or the State Water Project service area.” It appears that the language is aimed at avoiding additional reductions to water users due to the act, ESA, or other federal laws, as well as any resultant fiscal impacts. Section 404 of H.R. 3964 includes similar language; however, it is more broadly written and does not include the qualification referring to water service and repayment contracts, which include a savings clause for reductions in case of drought, other physical causes, and actions to meet legal obligations.

Section 203(b) would protect public, local, and state agencies or subdivisions of the state and entities from incurring any costs “incurred solely pursuant to or as a result of this Act” and which would not otherwise have been incurred, unless incurred on a voluntary basis. It does not address

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<sup>36</sup> *NRDC v. Jewell*, 749 F.3<sup>rd</sup> 776 (9<sup>th</sup> Circuit 2014).

<sup>37</sup> Bureau of Reclamation water service and repayment contracts typically include provisions qualifying the delivery of contract water supplies. For example, the CVP-wide form of contract includes in Article 3 a notation that due to hydrologic and regulatory factors, “the likelihood of the Contractor actually receiving the amount of Water set out in subdivision (a) of this Article in any given Year is uncertain.” A savings clause noting that the contract water supply may be reduced due to “errors in physical operations of the Project, drought, other physical causes beyond the control of the Contracting Officer or actions taken by the Contracting Officer to meet legal obligations is described in Article 11 of the CVP-wide form of contract (2003). (Available at [http://www.usbr.gov/mp/cvpia/3404c/lt\\_contracts/index.html](http://www.usbr.gov/mp/cvpia/3404c/lt_contracts/index.html).)

who or what entities should bear such costs if they occur. Nor does it address what type of costs. H.R. 3964 includes a similar provision; however it directs that no involuntary cost shall be imposed on any CVP contractor, “or any other person or entity.”

Section 203(c) would direct that nothing in the act shall modify or amend rights and obligations of the parties to any contract, including CVP water allocations to senior water rights contractors or SWP contractors and SWP settlement contractors.

## **Section 204. Allocations for Sacramento Valley Contractors**

Section 204 would provide new allocation criteria for existing CVP agricultural water service contractors within the Sacramento River Watershed (see **Table 1** for the allocations), subject to existing water rights priority for existing Sacramento River water rights holders, San Joaquin exchange contractors, and refuge or “managed wetlands” water supplies pursuant to Section 3406(d) of P.L. 102-575 (the Central Valley Project Improvement Act). Existing Sacramento River Watershed agricultural water service contractors are defined in the act to include Shasta, Trinity, and Sacramento Division agricultural water service contractors. The language is silent on whether such allocations might affect SWP and in-Delta or South of Delta contractors; however, arguably, if Sacramento River agricultural water service contractors receive more water in dry years it would seem that water might be diverted and used again downstream by others and possibly be available for diversion from the Delta. On the other hand, if it reduces water in storage it could have impacts for fish and wildlife and on supplies available in future years. It is not clear how or if the proposed allocation schedule would affect Trinity River flows. While the Trinity River is not hydrologically connected to, or part of, the Sacramento River watershed, water is diverted from the Trinity River to the Sacramento River via a tunnel, which is part of the CVP diversion infrastructure. Trinity River flows are not included in the list of limitations to which Section 204 allocations are subject; however, to the extent that Section 202(a) is inclusive of all state water rights priorities, such rights associated with Trinity flows, or other basin water supplies, may be protected. That said, Section 204 includes the following limitations:

- Section 204(b) would direct that the new allocation schedule contained in Section 204(a) shall not modify any provision of a water service contract that addresses Municipal and Industrial (M&I) water shortage policy or affect the authority of the Secretary of the Interior to adopt or modify such shortage policies.<sup>38</sup> (Section 204(b)(2) regarding the Secretary’s authority is repeated verbatim in Section 204(b)(3)). Section 204(b) also states that the subsection shall not affect the operation of American River Division operations or deliveries from any American River Division, “its units or its facilities.”
- Section 204(c) also states that the section shall not affect allocations to Friant Division contracts or cause involuntary reductions and would direct the Secretary of the Interior to develop a rescheduling program for CVP Sacramento water service contractors.

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<sup>38</sup> Such policies exist in part to allow for minimum M&I water supplies for public health and safety.



## **Title III. Miscellaneous Provisions**

### **Section 301. Effect on Existing Obligations**

Section 301 addresses preemption of Reclamation law and expiration of the act.

- Section 301 of H.R. 5781 states that nothing in the act shall preempt or modify existing Reclamation obligations under Reclamation law to operate the CVP in conformity with state law, including water rights priorities. H.R. 3964 includes a section that would have preempted state law in regard to implementation of the San Joaquin River Restoration Settlement Act. In contrast, Section 7 of S. 2198 includes a general declaration stating that “[n]othing in this Act preempts any State law in effect on the date of enactment of this Act, including area of origin and other water rights protections.”
- Section 302 states that the act will expire on September 30, 2016, or when the California state drought emergency declaration is suspended, whichever is later. This provision puts the state of California in the driver’s seat as to how long the legislation will remain in place. During the last drought, the state’s drought declaration remained in place longer than other indicators, such as the U.S. Drought Monitor and hydrologic data might have otherwise indicated. There is no comparable provision in H.R. 3964; however, S. 2198 includes a similar provision, but provides that only certain sections of the bill would expire.

## **Comparison of H.R. 5781 with H.R. 3964 and S. 2198**

The following three tables show a comparison of H.R. 5781 with selected similar sections H.R. 3964 and S. 2198. The comparative analysis among the bills is summarized in discussion above. The tables below show only a comparison of text from the bills themselves. H.R. 5781 is used as the base for comparison. Selected provisions that compare to provisions under H.R. 5781 are inserted into the table. If the provisions in H.R. 3964 and S. 2198 are exactly the same as H.R. 5781, or if no comparable provision to H.R. 5781 is found, it is noted in the tables.

**Table I. Title I (Sections 101 -105) of H.R. 5781 Compared to H.R. 3964 and S. 2198.**

<b>H.R. 5781</b>	<b>H.R. 3964</b>	<b>S. 2198</b>
SECTION 101. DEFINITIONS	Definitions in H.R. 3964 are specific to individual titles and in some cases depend on what law is being amended.	Section 3. DEFINITIONS
(I) CENTRAL VALLEY PROJECT- The term ‘Central Valley Project’ has the meaning given the term in section 3403 of the Central Valley Project Improvement Act (106 Stat. 4707).	Same as in H.R. 5781.	Same as in H.R. 5781.



H.R. 5781	H.R. 3964	S. 2198
(2) DELTA- The term 'Delta' means the Sacramento-San Joaquin Delta and the Suisun Marsh, as defined in sections 12220 and 29101 of the California Public Resources Code.	Not specifically defined in H.R. 3964.	No comparable language.
(3) NEGATIVE IMPACT ON THE LONG-TERM SURVIVAL- The term 'negative impact on the long-term survival' means to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.	No comparable.	No comparable language.
(4) SALMONID BIOLOGICAL OPINION- The term 'salmonid biological opinion' means the biological opinion issued by the National Marine Fisheries Service on June 4, 2009.	No comparable language in.	No comparable language.
(5) SECRETARIES- The term 'Secretaries' means—(A) the Secretary of Commerce; and (B) the Secretary of the Interior.	No comparable. However, when amending P.L. 102-575, Secretary means the Secretary of the Interior.	(4) SECRETARIES- The term 'Secretaries' means— (A) the Administrator of the Environmental Protection Agency; (B) the Secretary of Agriculture; (C) the Secretary of Commerce; and (D) the Secretary of the Interior.
Section 101(6) SMELT BIOLOGICAL OPINION- The term 'smelt biological opinion' means the biological opinion on the Long-Term Operational Criteria and Plan for coordination of the Central Valley Project and State Water Project issued by the United States Fish and Wildlife Service on December 15, 2008.	No comparable language.	No comparable language.
(7) STATE- The term 'State' means the State of California.	No comparable language.	Same as in H.R. 5781.
(8) STATE WATER PROJECT- The term 'State Water Project' means the water project described by California Water Code section 11550 et seq. and operated by the California Department of Water Resources.	No comparable language.	Same as H.R. 5781.
Section 102. EMERGENCY PROJECTS	No comparable language.	Section 4. EMERGENCY PROJECTS

H.R. 5781	H.R. 3964	S. 2198
<p>Section 102(a) In General- Subject to the priority of individuals or entities, including those with Sacramento River Settlement Contracts, that have priority to the diversion and use of water over water rights held by the United States for operations of the Central Valley Project and over rights held by the State for operations of the State Water Project and the United States obligation to make a substitute supply of water available to the San Joaquin River Exchange Contractors, the Secretaries shall direct the operations of the Central Valley Project and allow the State Water Project to provide the maximum quantity of water supplies possible to Central Valley Project agricultural, municipal and industrial, and refuge service and repayment contractors, and State Water Project contractors, by approving, consistent with applicable laws (including regulations)—</p> <p>(1) any project or operations to provide additional water supplies if there is any possible way whatsoever that the Secretaries can do so unless the project or operations constitute a highly inefficient way of providing additional water supplies; and</p> <p>(2) any projects or operations as quickly as possible based on available information to address the emergency conditions.</p>	<p>No comparable language.</p>	<p>Section 4(a) Water Supplies-</p> <p>(1) IN GENERAL- In response to the declaration of a state of drought emergency by the Governor of the State, the Secretaries shall provide the maximum quantity of water supplies possible to Central Valley Project agricultural, municipal and industrial, and refuge service and repayment contractors, State Water Project contractors, and any other locality or municipality in the State, by approving, consistent with applicable laws (including regulations), projects and operations to provide additional water supplies as quickly as possible based on available information to address the emergency conditions.</p> <p>(2) APPLICATION- Paragraph (1) applies to projects or operations involving the Klamath Project if the projects or operations would benefit Federal water contractors in the State.</p>
	<p>No comparable language.</p>	<p>(b) Limitation- Nothing in this section allows agencies to approve projects—</p> <p>(1) that would otherwise require congressional authorization; or</p> <p>(2) without following procedures required by applicable law.</p>
<p>(b) Mandate- In carrying out subsection (a), the applicable Secretary shall—</p>	<p>No comparable language.</p>	<p>(c) Administration- In carrying out subsection (a), the Secretaries shall, consistent with applicable laws (including regulations)—</p>

H.R. 5781	H.R. 3964	S. 2198
(1) authorize and implement actions to ensure that the Delta Cross Channel Gates remain open to the maximum extent practicable using findings from the United States Geological Survey on diurnal behavior of juvenile salmonids, timed to maximize the peak flood tide period and provide water supply and water quality benefits, consistent with operational criteria and monitoring set forth in the California State Water Resources Control Board's Order Approving a Temporary Urgency Change in License and Permit Terms in Response to Drought Conditions, effective January 31, 2014, or a successor order;	No comparable language.	(1) authorize and implement actions to ensure that the Delta Cross Channel Gates shall remain open to the greatest extent possible, timed to maximize the peak flood tide period and provide water supply and water quality benefits for the duration of the drought emergency declaration of the State, consistent with operational criteria and monitoring criteria developed pursuant to the California State Water Resources Control Board's Order Approving a Temporary Urgency Change in License and Permit Terms in Response to Drought Conditions, effective January 31, 2014, or a successor order;
	No comparable language.	(2)(A) collect data associated with the operation of the Delta Cross Channel Gates described in paragraph (1) and the impact of the operation on species listed as threatened or endangered under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.), water quality, and water supply; and
	No comparable language.	(B) after assessing the data described in subparagraph (A), require the Director of the National Marine Fisheries Service to recommend revisions to operations of the Central Valley Project and the California State Water Project, including, if appropriate, the reasonable and prudent alternatives contained in the biological opinion issued by the National Marine Fisheries Service on June 4, 2009, that are likely to produce fishery, water quality, and water supply benefits;
(2)(A) implement turbidity control strategies that allow for increased water deliveries for the Central Valley Project and State Water Project while avoiding a negative impact on the long-term survival delta smelt ( <i>Hypomesus transpacificus</i> ) due to entrainment at Central Valley Project and State Water Project pumping plants;	No comparable language.	(3)(A) implement turbidity control strategies that allow for increased water deliveries while avoiding jeopardy to adult delta smelt ( <i>Hypomesus transpacificus</i> ) due to entrainment at Central Valley Project and State Water Project pumping plants; and

H.R. 5781	H.R. 3964	S. 2198
(B) operating within the ranges provided for in the smelt biological opinion and the salmonid biological opinion to minimize water supply reductions for the Central Valley Project and the State Water Project, manage reverse flow in Old and Middle Rivers at -5,000 cubic feet per second (cfs) unless current scientific data indicate a less negative Old and Middle River flow is necessary to avoid a negative impact on the long-term survival of the listed species; and	No comparable language.	(B) manage reverse flow in the Old and Middle Rivers as prescribed by the biological opinions issued by the United States Fish and Wildlife Service on December 15, 2008, for Delta smelt and by the National Marine Fisheries Service on June 4, 2009, for salmonids, to minimize water supply reductions for the Central Valley Project and the State Water Project;
(C) show in writing that any determination to manage OMR reverse flow at rates less negative than -5000 cubic feet per second is necessary to avoid a significant negative impact on the long-term survival of the Delta smelt, including an explanation of the data examined and the connection between those data and the choice made prior to reducing pumping to a rate less negative than -5000 cfs;	No comparable language in H.R. 3964.	No comparable language in S. 2198.
(3) adopt a 1:1 inflow to export ratio for the increment of increased flow of the San Joaquin River, as measured as a 3-day running average at Vernalis during the period from April 1 through May 31, resulting from voluntary sale, transfers, or exchanges of water from agencies with rights to divert water from the San Joaquin River or its tributaries on the condition that a proposed sale, transfer, or exchange under this paragraph may only proceed if the Secretary of the Interior determines that the environmental effects of the proposed sale, transfer, or exchange are consistent with effects permissible under applicable law (including regulations), and provided that Delta conditions are suitable to allow movement of the acquired, transferred, or exchanged water through the Delta consistent with the Central Valley Project's and the State Water Project's permitted water rights;	No comparable language in H.R. 3964.	(4) adopt a 1:1 inflow to export ratio for the increased flow of the San Joaquin River, as measured as a 3-day running average at Vernalis during the period from April 1 through May 31, resulting from voluntary transfers and exchanges of water supplies, among other purposes;

H.R. 5781	H.R. 3964	S. 2198
<p>(4) issue all necessary permit decisions under the authority of the Secretaries within 30 days of receiving a completed application by the State to place and use temporary barriers or operable gates in Delta channels to improve water quantity and quality for Central Valley Project and State Water Project contractors and other water users, which barriers or gates should provide benefits for species protection and in-Delta water user water quality and shall be designed such that formal consultations under section 7 of the Endangered Species Act of 1973 (16 U.S.C. 1536) would not be necessary;</p> <p>(5)(A) complete all requirements under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) necessary to make final permit decisions on water transfer requests associated with voluntarily fallowing nonpermanent crops in the State, within 30 days of receiving such a request; and</p>	<p>No comparable language.</p> <p>Section 104 of H.R. 3964 amends §3405 of the Central Valley Project Improvement Act (P.L. 102-575) by</p> <p>(I) In subsection (a)—</p> <p>(A) by inserting before ‘Except as provided herein’ the following: ‘<i>The Secretary shall take all necessary actions to facilitate and expedite transfers of Central Valley Project water in accordance with this Act or any other provision of Federal reclamation law and the National Environmental Policy Act of 1969.</i>’;</p> <p>(B) in paragraph (1)(A), by striking ‘to combination’ and inserting ‘or combination’;</p> <p>(C) in paragraph (2), by adding at the end the following:</p> <p>(E) <i>The contracting district from which the water is coming, the agency, or the Secretary shall determine if a written transfer proposal is complete within 45 days after the date of submission of such proposal. If such district or agency or the Secretary determines that such proposal is incomplete, such district or agency or the Secretary shall state with specificity what must be added to or revised in order for such proposal to be complete.</i></p>	<p>(5) issue all necessary permit decisions under the authority of the Secretaries within 30 days of receiving a completed application by the State to place and use temporary barriers or operable gates in Delta channels to improve water quantity and quality for State Water Project and Central Valley Project South of Delta water contractors and other water users, which barriers or gates should provide benefits for species protection and in-Delta water user water quality and shall be designed such that formal consultations under section 7 of the Endangered Species Act of 1973 (16 U.S.C. 1536) would not be necessary;</p> <p>(6)(A) require the Director of the United States Fish and Wildlife Service and the Commissioner of the Bureau of Reclamation to complete all requirements under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) necessary to make final permit decisions on water transfer requests associated with voluntarily fallowing nonpermanent crops in the State, within 30 days of receiving such a request; and</p>

<b>H.R. 5781</b>	<b>H.R. 3964</b>	<b>S. 2198</b>
(B) allow any water transfer request associated with fallowing to maximize the quantity of water supplies available for nonhabitat uses as long as the fallowing and associated water transfer are in compliance with applicable Federal laws (including regulations);	No comparable language.	(B) require the Director of the United States Fish and Wildlife Service to allow any water transfer request associated with fallowing to maximize the quantity of water supplies available for nonhabitat uses as long as the fallowing and associated water transfer are in compliance with applicable Federal laws (including regulations);
	No comparable language.	(7) participate in, issue grants, or otherwise provide funding for, as soon as practicable after the date of enactment of this Act, under existing authority available to the Secretary of the Interior, pilot projects to increase water in reservoirs in regional river basins experiencing extreme, exceptional, or sustained drought that have a direct impact on the water supply of the State, including the Colorado River Basin, provided that any participation, grant, or funding by the Secretary with respect to the Upper Division shall be with or to the respective State;

H.R. 5781	H.R. 3964	S. 2198
<p>(6) allow any North of Delta agricultural water service contractor with unused Central Valley Project water to take delivery of such unused water through April 15, of the contract year immediately following the contract year in which such water was allocated, if—</p> <p>(A) the contractor requests the extension; and</p> <p>(B) the requesting contractor certifies that, without the extension, the contractor would have insufficient supplies to adequately meet water delivery obligations;</p>	<p>SEC. 115. SAN LUIS RESERVOIR.</p> <p>In connection with operations of the Central Valley Project, California, if San Luis Reservoir does not fill by the last day of February, the Secretary of the Interior shall permit any entity with an agricultural water service or repayment contract for the delivery of water from the Delta Division or the San Luis Unit to reschedule into the immediately following contract year (March 1 through the last day of February) any unused Central Valley Project water previously allocated for irrigation purposes. If water remaining in federal storage in San Luis Reservoir on the last day of February is insufficient to meet all rescheduling requests, the Secretary shall apportion, based on contract quantity, among all such contractors that request to reschedule water all water remaining in San Luis Reservoir on the last day of February. The Secretary shall thereafter make all reasonable efforts to make available additional rescheduled water; provided that such efforts shall not interfere with the Central Valley Project operations in the contract year into which Central Valley Project has been rescheduled.</p>	<p>(8) maintain all rescheduled water supplies held in the San Luis Reservoir and Millerton Reservoir for all water users for delivery in the immediately following contract water year unless precluded by reservoir storage capacity limitations;</p>
<p>(7) to the maximum extent possible based on the availability and quality of groundwater and without causing land subsidence—</p> <p>(A) meet the Level 2 and Level 4 water supply needs of units of the National Wildlife Refuge System in the Central Valley of California, the Gray Lodge, Los Banos, Volta, North Grasslands, and Mendota State wildlife management areas, and the Grasslands Resources Conservation District in the Central Valley of California through the improvement or installation of wells to use groundwater resources and the purchase of water from willing sellers; and</p>	<p>No comparable language.</p> <p>No comparable language.</p>	<p>(9) to the maximum extent possible based on the availability of water and without causing land subsidence or violating water quality standards—</p> <p>(A) meet the contract water supply needs of Central Valley Project refuges through the improvement or installation of water conservation measures, water conveyance facilities, and wells to use groundwater resources, which activities may be accomplished by using funding made available under the Water Assistance Program or the WaterSMART program of the Department of the Interior; and</p>



H.R. 5781	H.R. 3964	S. 2198
(B) make a quantity of Central Valley Project water obtained from the measures implemented under subparagraph (A) available to Central Valley Project water service contractors; and	No comparable language.	(B) make a quantity of Central Valley Project surface water obtained from the measures implemented under subparagraph (A) available to Central Valley Project contractors;
(8) implement instream and offsite projects in the Delta and upstream in the Sacramento River and San Joaquin basins, in coordination with the California Department of Water Resources and the California Department of Fish and Wildlife, that offset the effects on species listed as threatened or endangered under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) due to actions taken under this Act.	No comparable language.	(12) implement offsite upstream projects in the Delta and upstream Sacramento River and San Joaquin basins, in coordination with the California Department of Water Resources and the California Department of Fish and Wildlife, that offset the effects on species listed as threatened or endangered under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) due to actions taken under this Act; and
(c) Other Agencies- To the extent that a Federal agency other than agencies headed by the Secretaries has a role in approving projects described in subsections (a) and (b), the provisions of this section shall apply to those Federal agencies.	No comparable language.	(d) Other Agencies- To the extent that a Federal agency other than agencies headed by the Secretaries has a role in approving projects described in subsections (a) and (c), this section shall apply to those Federal agencies.
(d) Accelerated Project Decision and Elevation-	Sec. III REGULATORY STREAMLINING.	(e) Accelerated Project Decision and Elevation-

H.R. 5781	H.R. 3964	S. 2198
<p>(I) In General- Upon the request of the State, the heads of Federal agencies shall use the expedited procedures under this subsection to make final decisions relating to a Federal project or operation to provide additional water supplies or address emergency drought conditions pursuant to subsections (a) and (b).</p>	<p>(a) Applicability of Certain Laws- Filing of a Notice of Determination or a Notice of Exemption for any project, including the issuance of a permit under State law, related to any project of the CVP or the delivery of water therefrom in accordance with the California Environmental Quality Act shall be deemed to meet the requirements of section 102(2)(C) of the National Environmental Protection Act of 1969 (42 U.S.C. 4332(2)(C)) for that project or permit.</p> <p>(b) Continuation of Project- The Bureau of Reclamation shall not be required to cease or modify any major Federal action or other activity related to any project of the CVP or the delivery of water therefrom pending completion of judicial review of any determination made under the National Environmental Protection Act of 1969 (42 U.S.C. 4332(2)(C)).</p> <p>(c) Project Defined- For the purposes of this section:</p> <p>(1) CVP- The term 'CVP' means the Central Valley Project.</p> <p>(2) PROJECT- The term 'project'—</p> <p>(A) means an activity that—</p> <p>(i) is undertaken by a public agency, funded by a public agency, or that requires an issuance of a permit by a public agency;</p> <p>(ii) has a potential to result in physical change to the environment; and</p> <p>(iii) may be subject to several discretionary approvals by governmental agencies;</p> <p>(B) may include construction activities, clearing or grading of land, improvements to existing structures, and activities or equipment involving the issuance of a permit; or</p> <p>(C) as defined under the California Environmental Quality Act in section 21065 of the California Public Resource Code.</p>	<p>Same as H.R. 5781.</p>

H.R. 5781	H.R. 3964	S. 2198
(2) Request for Resolution-	No comparable language.	Same as H.R. 5781.
(A) In General- Upon the request of the State, the head of an agency referred to in subsection (a), or the head of another Federal agency responsible for carrying out a review of a project, as applicable, the Secretary of the Interior shall convene a final project decision meeting with the heads of all relevant Federal agencies to decide whether to approve a project to provide emergency water supplies.		
(B) Meeting- The Secretary of the Interior shall convene a meeting requested under subparagraph (A) not later than 7 days after receiving the meeting request.	No comparable language.	Same as H.R. 5781.
(3) Notification- Upon receipt of a request for a meeting under this subsection, the Secretary of the Interior shall notify the heads of all relevant Federal agencies of the request, including the project to be reviewed and the date for the meeting.	No comparable language.	Same as H.R. 5781.
(4) Decision- Not later than 10 days after the date on which a meeting is requested under paragraph (2), the head of the relevant Federal agency shall issue a final decision on the project in writing.	No comparable language.	(4) DECISION- Not later than 10 days after the date on which a meeting is requested under paragraph (2), the head of the relevant Federal agency shall issue a final decision on the project.
(5) Meeting Convened by Secretary- The Secretary of the Interior may convene a final project decision meeting under this subsection at any time, at the discretion of the Secretary, regardless of whether a meeting is requested under paragraph (2).	No comparable language.	Same as H.R. 5781.

H.R. 5781	H.R. 3964	S. 2198
<p>SECTION 103. TEMPORARY OPERATIONAL FLEXIBILITY FOR THE FIRST FEW STORMS OF THE WATER YEAR.</p> <p>(a) In general.—Consistent with avoiding a negative impact on the long-term survival in the short-term upon listed fish species beyond the range of those authorized under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) and other environmental protections under subsection (d), the Secretaries shall authorize the Central Valley Project and the State Water Project, combined, to operate at levels that result in negative Old and Middle River flows at –7500 cubic feet per second (based on United States Geological Survey gauges on Old and Middle Rivers) daily average for 28 cumulative days after October 1, as described in subsection (b).</p> <p>(b) Days of temporary operational flexibility.—The temporary operational flexibility described in subsection (a) shall be authorized on days that the California Department of Water Resources determines the daily average river flow of the Sacramento River is at, or above, 17,000 cubic feet per second as measured at the Sacramento River at Freeport gauge maintained by the United States Geologic Survey.</p> <p>(c) Compliance with ESA authorizations.—In carrying out this section, the Secretaries may continue to impose any requirements under the smelt and salmonid biological opinions during any period of temporary operational flexibility as they determine are reasonably necessary to avoid additional negative impacts on the long-term survival of a listed fish species beyond the range of those authorized under the Endangered Species Act of 1973.</p>	<p>No comparable language.</p> <p>No comparable language.</p> <p>No comparable language.</p>	<p>SECTION 4. EMERGENCY PROJECTS.</p> <p>(c) Administration.—In carrying out subsection (a), the Secretaries shall, consistent with applicable laws (including regulations)—</p> <p>....</p> <p>(B) manage reverse flow in the Old and Middle Rivers as prescribed by the biological opinions issued by the United States Fish and Wildlife Service on December 15, 2008, for Delta smelt and by the National Marine Fisheries Service on June 4, 2009, for salmonids, to minimize water supply reductions for the Central Valley Project and the State Water Project;</p> <p>No comparable language (see Section 4 above).</p> <p>No comparable language (see Section 4 above).</p>

H.R. 5781	H.R. 3964	S. 2198
<p>(d) Other environmental protections.—(1) The Secretaries' actions under this section shall be consistent with applicable regulatory requirements under state law, including State Water Resources Control Board Decision 1641, as it may be implemented in any given year.</p> <p>(2) During the first flush of sediment out of the Delta in each water year, and provided that such determination is based upon objective evidence, OMR flow may be managed at rates less negative than -5000 cubic feet per second for a minimum duration to avoid movement of adult Delta smelt (<i>Hypomesus transpacificus</i>) to areas in the southern Delta that would be likely to increase entrainment at Central Valley Project and State Water Project pumping plants.</p> <p>(3) This section shall not affect the application of the salmonid biological opinion from April 1 to May 31, unless the Secretary of Commerce finds that some or all of such applicable requirements may be adjusted during this time period to provide emergency water supply relief without resulting in additional adverse effects beyond those authorized under the Endangered Species Act of 1973. In addition to any other actions to benefit water supply, the Secretary and the Secretary of Commerce shall consider allowing through-Delta water transfers to occur during this period.</p> <p>(4) During operations under this section, the Commissioner of Reclamation, in coordination with the Fish and Wildlife Service, National Marine Fisheries Service, and California Department of Fish and Wildlife, shall undertake a monitoring program and other data gathering to ensure incidental take levels are not exceeded, and to identify potential negative impacts and actions, if any, necessary to mitigate impacts of the temporary operational flexibility to species listed under the Endangered Species Act of 1973.</p>	<p>No comparable language.</p>	<p>No comparable language.</p>

<b>H.R. 5781</b>	<b>H.R. 3964</b>	<b>S. 2198</b>
(e) Technical adjustments to target period.—If, before temporary operational flexibility has been implemented on 28 cumulative days, the Secretaries operate the Central Valley Project and the State Water Project combined at levels that result in Old and Middle River flows less negative than –7500 cubic feet per second during days of temporary operational flexibility as defined in subsection (b), the duration of such operation shall not be counted toward the 28 cumulative days specified in subsection (a).	No comparable language.	No comparable language.

H.R. 5781	H.R. 3964	S. 2198
<p>(f) Emergency consultation; effect on running averages.—</p> <p>(1) If necessary to implement the provisions of this section, the Commissioner shall use the emergency consultation procedures under the Endangered Species Act of 1973 and its implementing regulation at section 402.05, title 50, Code of Federal Regulations, to temporarily adjust the operating criteria under the biological opinions, solely for the 28 cumulative days of temporary operational flexibility—</p> <p>(A) no more than necessary to achieve the purposes of this section consistent with the environmental protections in subsections (c) and (d); and</p> <p>(B) including, as appropriate, adjustments to ensure that the actual flow rates during the periods of temporary operational flexibility do not count toward the 5-day and 14-day running averages of tidally filtered daily Old and Middle River flow requirements under the biological opinions.</p> <p>(2) At the conclusion of the 28 cumulative days of temporary operational flexibility, the Commissioner shall not reinitiate consultation on these adjusted operations, and no mitigation shall be required, if the effects on listed fish species of these operations under this section remain within the range of those authorized under the Endangered Species Act. If the Commissioner reinitiates consultation, no mitigation measures shall be required.</p>	<p>No comparable language.</p>	<p>No comparable language.</p>
<p>(g) Level of detail required for analysis.—In articulating the determinations required under this section, the Secretaries shall fully satisfy the requirements herein but shall not be expected to provide a greater level of supporting detail for the analysis than feasible to provide within the short time frame permitted for timely decision-making in response to changing conditions in the Delta.</p>	<p>No comparable language.</p>	<p>No comparable language.</p>



<b>H.R. 5781</b>	<b>H.R. 3964</b>	<b>S. 2198</b>
<b>SECTION 103- PROGRESS REPORT.</b>  Ninety days after the date of the enactment of this Act and every 90 days thereafter, the Secretaries shall provide a progress report describing the implementation of sections 101, 102, and 103 to the Committee on Natural Resources in the House of Representatives and the Committee on Energy and Natural Resources in the Senate.	No comparable language.	No comparable language.
<b>SECTION 105- UPDATE ON NEW STUDIES.</b>  One year after the date of the enactment of this Act, the Secretary of the Interior shall provide a progress report on the status of feasibility studies undertaken pursuant to section 103(d)(1) to the Committee on Natural Resources in the House of Representatives and the Committee on Energy and Natural Resources in the Senate. The report shall include timelines for study completion, draft environmental impact statements, final environmental impact statements, and Records of Decision.	No comparable language.	No comparable language.

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**Source:** H.R. 5781, as introduced; H.R. 3964, as passed the House of Representatives; and S. 2198, as passed the Senate in the 113<sup>th</sup> Congress.

**Table 2. Title II of H.R. 5781 Compared to H.R. 3964 and S. 2198.**

H.R. 5781	H.R. 3964	S. 2198
SEC. 201. OFFSET FOR STATE WATER PROJECT.	No comparable language.	No comparable language.
(a) Implementation Impacts- The Secretary of the Interior shall confer with the California Department of Fish and Wildlife in connection with the implementation of this Act on potential impacts to any consistency determination for operations of the State Water Project issued pursuant to California Fish and Game Code section 2080.1.		
Section 201(b) Additional Yield- If, as a result of the application of this Act, the California Department of Fish and Wildlife—(1) revokes the consistency determinations pursuant to California Fish and Game Code section 2080.1 that are applicable to the State Water Project; (2) amends or issues one or more new consistency determinations pursuant to California Fish and Game Code section 2080.1 in a manner that directly or indirectly results in reduced water supply to the State Water Project as compared with the water supply available under the Smelt Biological Opinion and the Salmonid Biological Opinion; or (3) requires take authorization under section 2081 for operation of the State Water Project in a manner that directly or indirectly results in reduced water supply to the State Water Project as compared with the water supply available under the Smelt Biological Opinion and the Salmonid Biological Opinion, and as a consequence of the Department's action, Central Valley Project yield is greater than it would have been absent the Department's actions, then that additional yield shall be made available to the State Water Project for delivery to State Water Project contractors to offset losses resulting from the Department's action.	No comparable language.	No comparable language.

H.R. 5781	H.R. 3964	S. 2198
201(c) Notification Related to Environmental Protections- The Secretary of the Interior shall immediately notify the Director of the California Department of Fish and Wildlife in writing if the Secretary of the Interior determines that implementation of the Biological Opinions consistent with this Act reduces environmental protections for any species covered by the opinions.	No comparable language.	No comparable language.
SEC. 202. AREA OF ORIGIN PROTECTIONS.  Section 202(a) In General- The Secretary of the Interior is directed, in the operation of the Central Valley Project, to adhere to California's water rights laws governing water rights priorities and to honor water rights senior to those held by the United States for operation of the Central Valley Project, regardless of the source of priority, including any appropriative water rights initiated prior to December 19, 1914, as well as water rights and other priorities perfected or to be perfected pursuant to California Water Code Part 2 of Division 2. Article 1.7 (commencing with section 1215 of chapter 1 of part 2 of division 2, sections 10505, 10505.5, 11128, 11460, 11461, 11462, and 11463, and sections 12200 to 12220, inclusive).	SEC. 401. WATER RIGHTS AND AREA-OF-ORIGIN PROTECTIONS.  Notwithstanding the provisions of this Act, Federal reclamation law, or the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.)—  (1) the Secretary of the Interior (“Secretary”) is directed, in the operation of the Central Valley Project, to strictly adhere to State water rights law governing water rights priorities by honoring water rights senior to those belonging to the Central Valley Project, regardless of the source of priority;	SEC. 7. EFFECT ON STATE LAWS.  Nothing in this Act preempts any State law in effect on the date of enactment of this Act, including area of origin and other water rights protections.

H.R. 5781	H.R. 3964	S. 2198
<p>Section 202(b) Diversions- Any action undertaken by the Secretary of the Interior or the Secretary of Commerce pursuant to both this Act and section 7 of the Endangered Species Act of 1973 (16 U.S.C. 1531, et seq.) that requires that diversions from the Sacramento River or the San Joaquin River watersheds upstream of the Delta be bypassed shall not be undertaken in a manner that alters the water rights priorities established by California law.</p> <p>Section 202(c) NEPA [sic] – Nothing in this title alters the existing authorities provided to and obligations placed upon the Federal Government under the Endangered Species Act of 1973 (16 U.S.C. 1531, et seq.), as amended. [changed to read “Section 202(c) Endangered Species Act.”, via Manager’s Amendment, Dec. 3, 2014.]</p>	<p>(2) the Secretary is directed, in the operation of the Central Valley Project, to strictly adhere to and honor water rights and other priorities that are obtained or exist pursuant to the provisions of California Water Code sections 10505, 10505:5, 11128, 11460, and 11463; and sections 12200 to 12220, inclusive; and</p> <p>(3) any action that affects the diversion of water or involves the release of water from any Central Valley Project water storage facility taken by the Secretary or the Secretary of the Department of Commerce to conserve, enhance, recover, or otherwise protect any species listed under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) shall be applied in a manner that is consistent with water right priorities established by State law.</p> <p>Section 114(g) NEPA.—Section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)) shall not apply with respect to section 402 and the issuance of any permit under this subsection during the seven year period beginning on the date of the implementation of the pilot program. [Sec. 402 addresses Sacramento River Settlement Contracts and ESA RPAs; Section 114 of H.R. 3964 otherwise addresses a pilot program to protect native and anadromous fish in the Stanislaus River. (See below)]</p>	<p>SEC. 7. EFFECT ON STATE LAWS.</p> <p>Nothing in this Act preempts any State law in effect on the date of enactment of this Act, including area of origin and other water rights protections.</p> <p>No directly comparable provision in S. 2198; however, with regard to emergency water projects, Section 4(b) provides a limitation that “Nothing in this section allows agencies to approve projects—</p> <p>(1) that would otherwise require congressional authorization; or</p> <p>(2) without following procedures required by applicable law.”</p>

<b>H.R. 5781</b>	<b>H.R. 3964</b>	<b>S. 2198</b>
Section 202(d) Contracts – With respect to individuals and entities with water rights on the Sacramento River, the mandates of this section may be met, in whole or in part, through a contract with the Secretary executed pursuant to section 14 of Public Law 76-260, 53 Stat. 1187 (43 U.S.C. 389) that is in conformance with the Sacramento River Settlement Contracts renewed by the Secretary in 2005.	<p><b>SEC. 402. SACRAMENTO RIVER SETTLEMENT CONTRACTS.</b></p> <p>In the implementation of the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.), in the Bay-Delta and on the Sacramento River, the Secretary and the Secretary of Commerce are directed to apply any limitations on the operation of the Central Valley Project or to formulate any 'reasonable prudent alternative' associated with the operation of the Central Valley Project in a manner that strictly adheres to and applies the water rights priorities for 'Project Water' and 'Base Supply' provided for in the Sacramento River Settlement Contracts. Article 3(i) of the Sacramento River Settlement Contracts shall not be utilized by the United States as means to provide shortages to the Sacramento River Settlement Contracts that are different than those provided for in Article 5(a) of those contracts.</p>	No comparable language.

H.R. 5781	H.R. 3964	S. 2198
<p>Section 203. NO REDIRECTED ADVERSE IMPACTS.</p> <p>Section 203(a) In General- The Secretary of the Interior shall ensure that, except as otherwise provided for in a water service or repayment contract, actions taken in compliance with legal obligations imposed pursuant to or as a result of this Act, including such actions under section 7 of the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) and other applicable Federal and State laws, shall not directly or indirectly—</p> <p>(1) result in the involuntary reduction of water supply or fiscal impacts to individuals or districts who receive water from either the State Water Project or the United States under water rights settlement contracts, exchange contracts, water service contracts, repayment contracts, or water supply contracts; or</p> <p>(2) cause redirected adverse water supply or fiscal impacts to those within the Sacramento River watershed, the San Joaquin River watershed or the State Water Project service area.</p> <p>203(b) Costs- To the extent that costs are incurred solely pursuant to or as a result of this Act and would not otherwise have been incurred by any entity or public or local agency or subdivision of the State of California, such costs shall not be borne by any such entity, agency, or subdivision of the State of California, unless such costs are incurred on a voluntary basis.</p>	<p>SEC. 404. NO REDIRECTED ADVERSE IMPACTS.</p> <p>The Secretary shall insure that there are no redirected adverse water supply or fiscal impacts to those within the Sacramento River or San Joaquin River watershed or to the State Water Project arising from the Secretary's operation of the Central Valley Project to meet legal obligations imposed by or through any State or Federal agency, including, but not limited to those legal obligations emanating from the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) or this Act, or actions or activities implemented to meet the twin goals of improving water supply or addressing environmental needs of the Bay Delta.</p> <p>No directly comparable provision in H.R. 3964; however, Section 108(c) provides that “(c) Costs- No cost associated with the implementation of this section shall be imposed directly or indirectly on any Central Valley Project contractor, or any other person or entity, unless such costs are incurred on a voluntary basis.</p>	<p>No comparable language.</p> <p>No comparable language.</p>

H.R. 5781	H.R. 3964	S. 2198
<p>203(c) Rights and Obligations Not Modified or Amended- Nothing in this Act shall modify or amend the rights and obligations of the parties to any existing—</p> <p>(1) water service, repayment, settlement, purchase, or exchange contract with the United States, including the obligation to satisfy exchange contracts and settlement contracts prior to the allocation of any other Central Valley Project water; or</p> <p>(2) State Water Project water supply or settlement contract with the State.</p>	<p>See Section 401 above.</p>	<p>No directly comparable language in S. 2198. See also, Section 7 above.</p>
<p>SEC. 204. ALLOCATIONS FOR SACRAMENTO VALLEY CONTRACTORS.</p> <p>(a) Allocations- (1) IN GENERAL- Subject to paragraph (2) and subsection (b), the Secretary of the Interior is directed, in the operation of the Central Valley Project, to allocate water provided for irrigation purposes to existing Central Valley Project agricultural water service contractors within the Sacramento River Watershed in compliance with the following:</p>	<p>SEC. 403. SACRAMENTO RIVER WATERSHED WATER SERVICE CONTRACTORS.</p> <p>(a) In General- Subject to subsection (b) and the absolute priority of the Sacramento River Settlement Contractors to Sacramento River supplies over Central Valley Project diversions and deliveries to other contractors, the Secretary is directed, in the operation of the Central Valley Project, to allocate water provided for irrigation purposes to existing Central Valley Project agricultural water service contractors within the Sacramento River Watershed in compliance with the following:</p>	<p>No comparable language.</p>



H.R. 5781	H.R. 3964	S. 2198
<p>(A) Not less than 100 percent of their contract quantities in a 'Wet' year.</p> <p>(B) Not less than 100 percent of their contract quantities in an 'Above Normal' year.</p> <p>(C) Not less than 100 percent of their contract quantities in a 'Below Normal' year that is preceded by an 'Above Normal' or a 'Wet' year.</p> <p>(D) Not less than 50 percent of their contract quantities in a 'Dry' year that is preceded by a 'Below Normal,' an 'Above Normal,' or a 'Wet' year.</p> <p>(E) In all other years not identified herein, the allocation percentage for existing Central Valley Project agricultural water service contractors within the Sacramento River Watershed shall not be less than twice the allocation percentage to south-of-Delta Central Valley Project agricultural water service contractors, up to 100 percent; provided, that nothing herein shall preclude an allocation to existing Central Valley Project agricultural water service contractors within the Sacramento River Watershed that is greater than twice the allocation percentage to South-of-Delta Central Valley Project agricultural water service contractors.</p>	<p>(1) Not less than 100% of their contract quantities in a 'Wet' year.</p> <p>(2) Not less than 100% of their contract quantities in an 'Above Normal' year.</p> <p>(3) Not less than 100% of their contract quantities in a 'Below Normal' year.</p> <p>(4) Not less than 75% of their contract quantities in a 'Dry' year.</p> <p>(5) Not less than 50% of their contract quantities in a 'Critically Dry' year.</p>	<p>No comparable language.</p>

<b>H.R. 5781</b>	<b>H.R. 3964</b>	<b>S. 2198</b>
<p>Section 204(a)(2) Conditions- The Secretary's actions under paragraph (a) shall be subject to—</p> <p>(A) the priority of individuals or entities with Sacramento River water rights, including those with Sacramento River Settlement Contracts, that have priority to the diversion and use of Sacramento River water over water rights held by the United States for operations of the Central Valley Project;</p> <p>(B) the United States obligation to make a substitute supply of water available to the San Joaquin River Exchange Contractors; and</p> <p>(C) the Secretary of the Interior's obligation to make water available to managed wetlands pursuant to section 3406(d) of the Central Valley Project Improvement Act, (Public Law 102-575).</p>	<p>No directly comparable language. However, see also section 404 (no redirected impacts) and sections 401 – 403 above.</p>	<p>No comparable language. (See also, Section 7 above.)</p>

H.R. 5781	H.R. 3964	S. 2198
<p>Section 204(b) Protection of Municipal and Industrial Supplies- Nothing in subsection (a) shall be deemed to—(1) modify any provision of a water service contract that addresses municipal and industrial water shortage policies of the Secretary; (2) affect or limit the authority of the Secretary of the Interior to adopt or modify municipal and industrial water shortage policies;</p> <p>(3) affect or limit the authority of the Secretary of the Interior to implement municipal and industrial water shortage policies; or</p> <p>(4) affect allocations to Central Valley Project municipal and industrial contractors pursuant to such policies.</p> <p>Neither subsection (a) nor the Secretary of the Interior's implementation of subsection (a) shall constrain, govern or affect, directly or indirectly, the operations of the Central Valley Project's American River Division or any deliveries from that Division, its units or its facilities.</p>	<p>Section 403(b) Protection of Municipal and Industrial Supplies- Nothing in subsection (a) shall be deemed to: (i) modify any provision of a water service contract that addresses municipal and industrial water shortage policies of the Secretary; (ii) affect or limit the authority of the Secretary to adopt or modify municipal and industrial water shortage policies; (iii) affect or limit the authority of the Secretary to implement municipal and industrial water shortage policies; or (iv) affect allocations to Central Valley Project municipal and industrial contractors pursuant to such policies. Neither subsection (a) nor the Secretary's implementation of subsection (a) shall constrain, govern or affect, directly or indirectly, the operations of the Central Valley Project's American River Division or any deliveries from that Division, its units or its facilities.</p>	<p>No comparable language.</p>
<p>Section 204(c) No Effect on Allocations- This section shall not—</p> <p>(1) affect the allocation of water to Friant Division contractors; or</p> <p>(2) result in the involuntary reduction in contract water allocations to individuals or entities with contracts to receive water from the Friant Division.</p> <p>(d) Program for Water Rescheduling- The Secretary of the Interior shall direct that the United States Bureau of Reclamation develop and implement a program, not later than one year after the date of the enactment of this Act, to provide for the opportunity for existing Central Valley Project agricultural water service contractors within the Sacramento River Watershed to reschedule water, provided for under their Central Valley Project water service contracts, from one year to the next.</p>	<p>No comparable language.</p> <p>No comparable language in H.R. 3964. (Section 115 of H.R. 3964 addresses rescheduling of water from San Luis Reservoir.)</p>	<p>No comparable language.</p> <p>Section 4(c)(8) maintain all rescheduled water supplies held in the San Luis Reservoir and Millerton Reservoir for all water users for delivery in the immediately following contract water year unless precluded by reservoir storage capacity limitations.</p>

<b>H.R. 5781</b>	<b>H.R. 3964</b>	<b>S. 2198</b>
(e) Definitions- In this section:  (1) The term `existing Central Valley Project agricultural water service contractors within the Sacramento River Watershed' means water service contractors within the Shasta, Trinity, and Sacramento River Divisions of the Central Valley Project, that have a water service contract in effect, on the date of the enactment of this section, that provides water for irrigation.  (2) The year type terms used in subsection (a) have the meaning given those year types in the Sacramento Valley Water Year Type (40-30-30) Index.	(c) Definitions- In this section:  (1) The term `existing Central Valley Project agricultural water service contractors within the Sacramento River Watershed' means water service contractors within the Shasta, Trinity, and Sacramento River Divisions of the Central Valley Project, that have a water service contract in effect, on the date of the enactment of this section, that provides water for irrigation.  (2) The year type terms used in subsection (a) have the meaning given those year types in the Sacramento Valley Water Year Type (40-30-30) Index.	No comparable language.

**Source:** H.R. 5781, as introduced; H.R. 3964, as passed the House of Representatives; and S. 2198, as passed the Senate in the 113<sup>th</sup> Congress.

**Table 3. Title III of H.R. 5781 Compared to H.R. 3964 and S. 2198.**

H.R. 5781	H.R. 3964	S. 2198
<p><b>SEC. 301. EFFECT ON EXISTING OBLIGATIONS.</b></p> <p>Nothing in this Act preempts or modifies any existing obligation of the United States under Federal reclamation law to operate the Central Valley Project in conformity with State law, including established water rights priorities.</p>	<p>No comparable provision. However, Section 204(l)(a)(D) would add to the San Joaquin River Restoration Settlement Act "(m) In General—Notwithstanding section 8 of the Reclamation Act of 1902, except as provided in this part, including title IV of the Sacramento and San Joaquin Valleys Water Reliability Act, this part preempts and supersedes any State law, regulation, or requirement that imposes more restrictive requirements or regulations on the activities authorized under this part. Nothing in this part shall alter or modify the obligations, if any, of the Friant Division, Hidden Unit, and Buchanan Unit of the Central Valley Project, or other water users on the San Joaquin River or its tributaries, under orders issued by the State Water Resources Control Board pursuant to the Porter-Cologne Water Quality Control Act (California Water Code sections 13000 et seq.). Any such order shall be consistent with the congressional authorization for any affected Federal facility as it pertains to the Central Valley Project.</p>	<p><b>SEC. 7. EFFECT ON STATE LAWS.</b></p> <p>Nothing in this Act preempts any State law in effect on the date of enactment of this Act, including area of origin and other water rights protections.</p>
<p><b>SEC. 302. TERMINATION OF AUTHORITIES.</b></p> <p>This Act shall expire on September 30, 2016, or the date on which the Governor of the State suspends the state of drought emergency declaration, whichever is later.</p>	<p>No comparable provision.</p>	<p><b>SEC. 8. TERMINATION OF AUTHORITIES.</b></p> <p>The authorities under section 4(a), paragraphs (1) through (6) of section 4(c), paragraphs (8) and (9) of section 4(c), paragraphs (11) through (13) of section 4(c), section 5, and section 6 permanently expire on the date on which the Governor of the State suspends the state of drought emergency declaration.</p>

**Source:** H.R. 5781, as introduced; H.R. 3964, as passed the House of Representatives; and S. 2198, as passed the Senate in the 113<sup>th</sup> Congress.

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